

**BEFORE THE WORKERS COMPENSATION APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SINAH M. GOSNELL
Claimant

V.

**ADVENTURES WHILE GROWING
CHILDCARE CENTER, INC.**
Respondent

AND

RIVERPORT INSURANCE COMPANY
Insurance Carrier

Docket No. 1,069,327

ORDER

Respondent and insurance carrier (respondent), by and through Ronald J. Laskowski of Topeka, request review of Administrative Law Judge Thomas Klein's June 20, 2014 preliminary hearing Order. Charles W. Hess of Wichita appeared for claimant.

The record on appeal is the same as that considered by the judge and consists of the June 12, 2014 preliminary hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

The parties agreed for preliminary hearing purposes that claimant sustained a compensable accident on March 14, 2014. Respondent agreed to provide claimant with medical treatment, but asserted claimant was not entitled to temporary total disability (TTD) benefits based on the contention she abandoned accommodated employment and was terminated for cause. The judge ordered payment of TTD.

Respondent requests the Order be reversed, alleging the judge exceeded his jurisdiction. Respondent argues claimant is not entitled to TTD benefits because she abandoned accommodated work respondent would have kept providing.

Claimant contends the Board does not have jurisdiction to review the preliminary hearing Order because respondent's appeal does not address any issues subject to review as set forth in K.S.A. 44-534a(a)(2). Accordingly, claimant requests the Board dismiss this appeal. Alternatively, claimant maintains the Order should be affirmed.

The issue for the Board's determination is:

Does the Board have jurisdiction to review the preliminary hearing Order?

FINDINGS OF FACT

Claimant worked as a teacher for respondent. On March 14, 2014, she injured her left shoulder after falling out of a chair. Claimant obtained medical treatment and returned to work on March 17, 2014, with temporary restrictions. On March 25, 2014, claimant missed work for reasons disputed by the parties. Claimant contends she was fired that morning by an employee named Joy Yunker, but both Ms. Yunker and Britney Kinast, the director of the facility, testified Ms. Yunker lacked authority to fire claimant. Ms. Kinast testified respondent would have continued to accommodate claimant's restrictions had claimant not abandoned her job, which resulted in her employment being terminated.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-510c(b)(2) states, in part:

(B) A refusal by the employee of accommodated work within the temporary restrictions imposed by the authorized treating physician shall result in a rebuttable presumption that the employee is ineligible to receive temporary total disability benefits.

(C) If the employee has been terminated for cause . . . following a compensable injury, the employer shall not be liable for temporary total disability benefits if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician but for the employee's separation from employment.

K.S.A. 2013 Supp. 44-534a(a)(2) states, in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 2013 Supp. 44-551(l)(2)(A) states, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 2013 Supp. 44-534a(a)(2) grants a judge jurisdiction to decide issues concerning payment of medical compensation and temporary total disability compensation. K.S.A. 44-534a also specifically gives the judge authority to grant or deny the request for TTD compensation pending a full hearing on the claim. "Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly."¹

Not every alleged error in law or fact is subject to review. On an appeal from a preliminary hearing Order, the Board can review only allegations that the judge exceeded his or her jurisdiction under K.S.A. 2013 Supp. 44-551 and jurisdictional issues listed in K.S.A. 2013 Supp. 44-534a(a)(2), which are: (1) did the worker sustain an accident, repetitive trauma or resulting injury; (2) did the injury arise out of and in the course of employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.²

ANALYSIS

The judge did not exceed his jurisdiction in determining payment of TTD was appropriate for an otherwise compensable injury. Such authority includes the possibility he decided the matter incorrectly. Whether a claimant was terminated for cause, and is thus not entitled to TTD benefits, is not a jurisdictional issue listed in K.S.A. 2013 Supp. 44-534a(a)(2). Moreover, K.S.A. 2013 Supp. 44-510c(b)(2)(B) and (C) do not provide a certain defense. "Since the review requested by claimant does not raise an issue of compensability enumerated in K.S.A. 2013 Supp. 44-534a(2), and there has been no showing the ALJ exceeded his authority, the application for Board review must be dismissed for lack of jurisdiction."³

¹ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

² See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

³ *Willis v. Clearview City*, No. 1,067,116, 2014 WL 1340598 (Kan. WCAB Mar. 24, 2014); see also *Chappell v. Sugar Creek Packing Co.*, No. 1,068,774, 2014 WL 3055470 (Kan. WCAB June 5, 2014); *Reineke v. Preferred Personnel, Inc.*, No. 1,067,501, 2014 WL 889882 (Kan. WCAB Feb. 28, 2014); *Ramirez v. Murfin Drilling Co., Inc.*, No. 1,061,372, 2014 WL 889872 (Kan. WCAB Feb. 10, 2014); *Beaver v. Spangles*, No. 1,067,204, 2014 WL 517253 (Kan. WCAB Jan. 16, 2014); and *Dominguez-Rodriguez v. Amarr Garage Doors*, No. 1,058,613, 2012 WL 1652979 (Kan. WCAB Apr. 24, 2012).

CONCLUSIONS

The Board does not have jurisdiction to hear respondent's appeal. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁴ Accordingly, the appeal is dismissed.

WHEREFORE, the appeal of the preliminary hearing Order is dismissed.⁵

IT IS SO ORDERED.

Dated this _____ day of August 2014.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

ec: Charles W. Hess - chuck@ksworkcomplaw.com

Ronald J. Laskowski - Ron@LaskowskiLaw.com; kristi@LaskowskiLaw.com

Honorable Thomas Klein

⁴ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

⁵ By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.